

**Peninsular Concord Sdn Bhd v Datuk M Kayveas & Anor
(both practicing as advocate and solicitor under the name and
style of Messrs Blanche Kayveas & Co)**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-150 OF
1997
HARMINDAR SINGH JC
28 JULY 2010

*Civil Procedure — Pleadings — Parties to action bound by own pleadings —
Inconsistencies in pleadings — Whether defendants could deny facts which had been
earlier admitted*

*Tort — Defamation — Libel — Defence of absolute privilege — Statements in
pleadings — Whether statements in course of proceedings considered absolute
privilege*

The plaintiff was a company doing contracting work and the defendants were advocate and solicitors of a law firm. The plaintiff claimed that RM470,000 ('the said sum') was deposited with the defendants' law firm. The plaintiff argued that the defendant's law firm, in its capacity as a stakeholder, had agreed to hold the said sum for securing a roadwork project by the plaintiff in a joint venture with a company, Dolmite Engineering Sdn Bhd ('Dolmite'). However, when there was no progress in the roadwork project, the plaintiff requested the defendants return of the said sum. The defendants submitted that the said sum would be delivered to Uniquet Sdn Bhd ('Uniquet'), the consultants for processing the roadwork project, as there was no stakeholder agreement between the plaintiff and the defendants. The defendants argued that their law firm acted for Dolmite and not the plaintiff in the release of the said sum to Uniquet's solicitors. The plaintiff filed a claim to obtain the sum from the defendants. The defendants filed a counterclaim for damages for defamation for filing of a wrongful action. The plaintiff argued that a letter dated 1 January 1997 indicating the said sum delivered to the defendants' office was acknowledged by the defendants' office. However, the defendants questioned the authenticity of the letter and argued that the original was not produced in court. The defendants submitted that there could be another letter or a corrected letter which the defendants also argued that the letter did not specify a pending outcome of a future event, thus, it was not a stakeholding letter.

Held, allowing the plaintiff's claim with costs and dismissing the defendants' counterclaim:

- A (1) The defendants appeared to have conceded on the issue of
acknowledging receipt of the letter dated 1 January 1997 ('the letter') in
the statement of agreed facts signed by solicitors of both parties. The first
defendant in his evidence-in-chief had admitted that his firm received the
letter. The defendants are estopped from changing their position in a way
B that is inconsistent with what had been agreed in relation to the letter in
accordance to s 115 of the Evidence Act 1950 (see paras 15 & 17–18).
- C (2) The terms of the said letter reflected a stakeholding arrangement as the
release or payment awaited the occurrence of a future event which was
information leading to the satisfaction of the plaintiff of the feasibility
and viability of the project and authority to release the stakeholder sum.
The crux is that the defendants were bound by the terms of the
arrangement with the plaintiff which had been accepted (see para 35).
- D (3) No details and information regarding the project were provided and
importantly, the plaintiff never authorised the defendants to release the
sum of RM470,000. As a result, there was a breach by the defendants of
the terms of the stakeholding arrangement thus the plaintiff was entitled
to recover the stakeholder sum. Once the defendants had accepted the
cheque, they were bound to the terms under which the cheque was given
E (see paras 36–37).
- F (4) The absolute privilege will attach to all matters beginning with the
institution of the suit together with the statements made in the pleadings
and other documents in the course of proceedings thus, the defendants'
counterclaim for damages for defamation for filing of a wrongful action
cannot succeed (see para 41).

[Bahasa Malaysia summary]

- G Plaintiff adalah syarikat yang menjalankan kerja kontrak dan
defendan-defendan adalah peguambela dan peguamcara firma
undang-undang. Plaintiff mendakwa bahawa RM470,000 ('jumlah tersebut')
didepositkan kepada firma undang-undang defendan-defendan. Plaintiff
berhujah bahawa firma undang-undang defendan-defendan, dalam
kapasitinya sebagai pemegang amanah, telah bersetuju untuk memegang
H jumlah tersebut bagi menjamin projek pembinaan dan pemuliharaan jalan
oleh plaintiff di dalam usahasama dengan sebuah syarikat, Dolmite Engineering
Sdn Bhd ('Dolmite'). Walau bagaimanapun, apabila tidak terdapat
perkembangan dalam projek pembinaan dan pemuliharaan jalan tersebut,
plaintiff memohon kepada defendan untuk mengembalikan jumlah tersebut.
I Defendan berhujah bahawa jumlah tersebut akan diserahkan kepada Uniquet
Sdn Bhd ('Uniquet'), perunding-perunding untuk memproses projek
pembinaan dan pemuliharaan jalan, memandangkan tidak terdapat perjanjian
pemegang amanah di antara plaintiff dan defendan-defendan.
Defendan-defendan berhujah bahawa firma mereka bertindak untuk Dolmite

dan bukan plaintif dalam membayar jumlah tersebut kepada peguam-peguam Uniquet. Plaintif memfailkan tuntutan untuk memperoleh jumlah tersebut daripada defendan-defendan. Defendan-defendan memfailkan tuntutan balas untuk ganti rugi untuk fitnah kerana memfailkan tindakan yang salah. Plaintif berhujah bahawa surat bertarikh 1 Januari 1997 ('surat tersebut') menunjukkan jumlah tersebut dihantar ke pejabat defendan-defendan telah diakui terima oleh pejabat defendan-defendan. Walau bagaimanapun, defendan-defendan menyoal tentang ketulenan surat tersebut dan berhujah bahawa surat asal tidak dikemukakan di mahkamah. Defendan-defendan berhujah bahawa mungkin terdapat surat yang lain atau surat betul yang mana defendan-defendan juga berhujah bahawa surat tersebut tidak menyatakan hasil kejadian masa depan yang belum selesai, oleh itu, ia bukan surat pemegangan amanah.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan-defendan:

- (1) Defendan-defendan jelas mengaku atas isu mengakui terima surat bertarikh 1 Januari 1997 di dalam pernyataan fakta yang dipersetujui yang ditandatangani oleh peguam kedua-dua pihak. Defendan pertama di dalam keterangan utamanya telah mengaku bahawa firmanya telah menerima surat tersebut. Defendan-defendan diestop daripada menukar kedudukan mereka dalam cara yang tidak konsisten dengan apa yang telah dipersetujui berkaitan surat tersebut mengikut s 115 Akta Keterangan 1950 (lihat perenggan 15 & 17–18).
- (2) Terma-terma surat tersebut membayangkan penyusunan pemegangan amanah sebagai pelepasan atau pembayaran menunggu kejadian keadaan masa depan yang mana adalah maklumat yang membawa kepada kepuasan plaintif mengenai kebolehlaksanaan dan daya maju projek tersebut dan kuasa untuk melepaskan jumlah pemegang amanah tersebut. Terasnya adalah bahawa defendan-defendan terikat dengan terma-terma penyusunan dengan plaintif yang telah diterima (lihat perenggan 35).
- (3) Tiada butir dan maklumat berkaitan projek tersebut diberikan dan yang pentingnya, plaintif tidak memberikan kebenaran kepada defendan-defendan untuk melepaskan jumlah RM470,000 tersebut. Akibatnya, terdapat kemungkiran oleh defendan-defendan terhadap terma-terma penyusunan pemegangan amanah tersebut oleh itu plaintif berhak untuk mendapatkan kembali jumlah pemegang amanah tersebut. Apabila defendan-defendan telah menerima cek tersebut, mereka terikat dengan terma-terma di bawah mana cek tersebut diberikan (lihat perenggan 36–37).
- (4) Keistimewaan mutlak akan terikat kepada semua perkara bermula dengan permulaan tindakan tersebut bersama dengan

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- A pernyataan-pernyataan yang dibuat di dalam pliding dan dokumen-dokumen lain di dalam perjalanan prosiding ini. Oleh itu, tuntutan balas defendan-defendan untuk ganti rugi bagi fitnah kerana memfailkan tindakan yang salah tidak dapat dipertahankan (lihat perenggan 41).]

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Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 369–527. For cases on parties to action bound by own pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6130–6137.

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Cases referred to

August Leonhardt, The [1985] 2 Lloyd's Rep 28 (refd)

Lincoln v Daniels [1962] 1 QB 237, CA (refd)

Maloney v Hardy (1970) 216 EG 1582 (refd)

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Surendra Krishna Roy v Mahammad Syed Ali (1936) 160 PC 28, PC (refd)

Tan Sri Tan Hian Tsin v PP [1979] 1 MLJ 73, FC (refd)

Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116; [1987] CLJ (Rep) 400, SC (refd)

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Legislation referred to

Evidence Act 1950 ss 58(1), 65, 65(1)(a), 66, 115

Gopal Sreenevasan (Sreenevasan Young) for the plaintiff.

Sharif bin Mohamed (Munjeet Singh with him) (Sharif & Khoo) for the defendants.

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Harmindar Singh JC:

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[1] The plaintiff is a company doing contracting work. The defendants were, at the relevant time, advocates and solicitors practicing as Messrs Blanche Kayveas & Co. The plaintiff claims that by a letter dated 1 February 1997, a sum of RM470,000 was deposited vide DCB Bank Bhd Cheque No 270010 with the defendants' firm. This sum was to be held by the defendants' firm as stakeholder to abide the securing of a roadwork project by the plaintiff in joint venture with a company known as Dolomite Engineering Sdn Bhd ('Dolomite'). As no details or information pertaining to the said roadwork project was forthcoming, the plaintiff wrote a letter dated 10 March 1997 to the defendants for return of the said sum.

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[2] The defendants, however, refused to return the said sum claiming that although they had received the said sum of RM470,000, there was no such stakeholder agreement between the plaintiff and the defendants. The defendants contended that their only role was to release the said sum to the

solicitors for one Uniquet Sdn Bhd ('Uniquet') which they did. They contended that Uniquet were the consultants for processing the said roadwork project. Given this stand taken by the defendants, the plaintiff accordingly filed this claim for the return of the said sum. The defendants not only resisted the claim but in turn filed a counterclaim for damages for RM200m for defamation for the filing of this wrongful action as they put it.

THE FACTS

[3] The evidence for the plaintiff disclosed that PW1, the managing director of Dolomite at that time, met with the first defendant sometime in late 1996 and early 1997. The meeting was to discuss the possibility of securing projects for the plaintiff and Dolomite. The plaintiff and Dolomite had previously done several projects on a joint venture basis. PW1 claimed that the first defendant told him that there was a project in the pipeline but a sum of RM470,000 was to be deposited with his firm to be held on a stakeholder basis.

[4] Arising out of this arrangement, PW1 then personally delivered the letter dated 1 February 1997 containing the terms of the arrangement to the first defendant at his office as well as the cheque of the plaintiff for the sum of RM470,000. PW1 then witnessed the signature of the first defendant on the said document acknowledging receipt. The said letter appears as follows:

Our ref: C/HI/PCSB/073 1st February 1997

Blanche Kayveas & Co.

#29A Jalan Maharajalela

50150 Kuala Lumpur

Attention: YB Datuk Kayveas

Dear YB Datuk,

ROADWORK PROJECT FOR PENINSULAR CONCORD SDN BHD AND
DOLOMITE ENGINEERING SDN BHD JOINT VENTURE

- I) We have been advised by you that there is currently a roadwork project in the market. As requested by you, we are now enclosing our cheque No. DCB 270010 for Ringgit Malaysia Four Hundred and Seventy Thousand Only (RM470,000/=) to be held by your firm as stakeholder pending the award of the said roadwork project.

It is our understanding that the said stakeholder sum of RM470,000/= will be refunded to us in the event that the said roadwork project is not awarded to 'Peninsular Concord Sdn Bhd and Dolomite Engineering Sdn Bhd Joint Venture' (hereinafter referred to as PC-DE JV').

We have been informed that upon receipt of the above stakeholder sum, you will extend to us all details and information pertaining to the said roadwork project for our evaluation of its feasibility and viability.

- A** Should we be satisfied with the feasibility and viability of the said project upon receipt of the principal's letter of award for the roadwork project, we will officially inform you to authorize the release of the said stakeholder sum to the relevant party(ies) to be advised by you, in order to secure the said project.
- B** II) After the award of the roadwork project to PC-DE JV, we will arrange for a further placement of RM470,000.00/= with your firm for your remittance to the relevant party(ies) to be advised again by you.
- III) After the receipt of the first payment from the principal of the roadwork project by PC-DE JV, we shall place a further RM1,410,000/= with your firm for your necessary transmission.
- C** We trust that the above are agreeable by you and would appreciate if you could sign and return the duplicate of this letter to confirm your agreement to the above and to acknowledge receipt of the said cheque of RM470,000/= as stakeholder sum.
- D** Thank you.
Yours faithfully,
PENINSULAR CONCORD SDN BHD
TUAN HAJI HARUN IBRAHIM
- E** Chairman
I/We hereby agree to above and acknowledge receipt of the cheque of RM470,000/=
- F** [5] At the bottom of the letter, there was a rubber stamp of the firm of Blanche Kayveas & Co, Advocates and Solicitors, indicating receipt on 4 February 1997 at 12.25pm with the signature of the first defendant as alleged by PW1. Now there were some objections raised by the defendants with regards to the said letter and I will come to these objections in a moment.
- G** [6] After sending out this letter and the cheque, the plaintiff and PW1 were expecting to hear from the first defendant. After waiting for more than a month and with no response forthcoming, the plaintiff and PW1 decided to secure the return of the sum of RM470,000.
- H** [7] A letter dated 10 March 1997 was then sent out by the plaintiff to the defendant firm seeking the return of the said sum of RM470,000. In return, the defendants' firm prepared a letter dated 14 March 1997 enclosing a cheque for the said sum. On the same day, PW3, who is currently the managing director of Dolomite, went to the defendants' firm expecting to collect the cheque. He discovered, however, that it was a post dated third party cheque and refused to accept it. A letter of demand followed for the return of the said sum.
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[8] For the defendants, the first defendant, in his testimony, said that Uniquest acted as the consultants to negotiate a roadwork project for Dolomite. One of the terms was to deposit a sum of RM470,000 being 1% of the total value of the project which sum had to be paid to Uniquest before the commencement of any negotiation. He claimed that his legal firm acted for Dolomite and not the plaintiff in the release of the said sum of RM470,000 to Messrs Hullon & Co who were a firm of advocates and solicitors acting for Uniquest. He relied on a letter dated 24 January 1997 from Uniquest to the defendants to set out the duty of the defendants to release the said sum of RM470,000. He also claimed that the refusal of the plaintiff to accept the money when it was being returned caused an injustice to him and his legal firm. He further claimed that whatever that had transpired was probably a plot by someone to embarrass him and his legal firm.

[9] DW2, who was the managing director of Uniquest, told the court that it was agreed between him and PW1 that the sum of RM470,000 was to be paid to Uniquest or to him. Eventually the said sum was paid over to him personally at the request of Uniquest. Interestingly, PW1 denied ever meeting DW2 and claimed that the letter of 24 January 1997 together with some of the other letters of the defendants were contrived to defeat the plaintiff's application for summary judgment.

THE ISSUES

[10] Arising out of their competing assertions, it appeared to me that the sole issue upon which this matter ought to be decided is whether, upon a construction of the terms of the letter dated 1 February 1997, the defendants accepted the said sum of RM470,000 as stakeholders. If so, the question that follows is whether the monies paid were in breach of the terms of the agreement as set out in the letter. As for the counterclaim, the issue was whether the defendants were entitled to damages.

[11] In resolving these issues, it became important to construe the terms of the all important letter of 1 February 1997. However, as I had alluded to earlier, there were some serious objections to the said letter by the defendants. What were these objections?

Authenticity of the letter of 1 February 1997

[12] The defendants were disputing both the authenticity and contents of the letter dated 1 February 1997 ('the said letter') on the ground that the original was not produced in court. The first defendant also appears to suggest

A in his evidence that the said letter may not have been the letter that he acknowledged and even went on to dispute the rubber stamp as the one belonging to his firm.

B [13] In this regard, it is necessary to recap the evidence of PW1 who was the person dealing with the first defendant. PW1 told the court that he was the one who discussed the terms of the stakeholding with the first defendant. He also delivered the letter dated 1 February 1997 (marked as ID1) and witnessed the signature of the first defendant. The duplicate of the said letter, as stated in the letter itself, was taken by him. The first defendant, however, gave evidence that
C the original letter was given back to PW1 to make corrections and that therefore he did not keep a copy for that reason. He now appears to suggest that he does not know if the letter marked as ID1 is the same document that he had signed.

D [14] Having considered all the evidence in this case, I find the stance adopted by the first defendant to be rather odd. In the first place, in para 4 of the statement of claim, the plaintiff had pleaded that the claim was based upon an agreement evidenced by the said letter of 1 February 1997. In their defence, the
E defendants have made no assertion anywhere that the said letter was not received or executed. It is only stated that there was no agreement.

[15] Secondly, the defendants appear to have conceded on the issue of acknowledging receipt of the said letter in the statement of agreed facts signed by both solicitors on 22 November 2007 (encl 90). At para 2 of the same, it is
F stated:

2. The Plaintiff had deposited a sum of RM470,000.00 under the DCB Bank Berhad Cheque no 270010 with the defendants' Firm. The Defendants' firm acknowledged receipt of the Plaintiff's letter dated 1.2.1997.

G [16] The effect of such a statement is set out in s 58(1) of the Evidence Act 1950 which reads:

H 58 Facts admitted need not be proved.

(1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading:

I Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

[17] It is also noteworthy that in his evidence-in-chief, the first defendant admitted that his firm received the letter of 1 February 1997 which letter the first defendant confirmed appeared at pp 6–7 of the bundle B3. He was only unhappy with some of the contents stated in the letter. However, during cross-examination, the first defendant suddenly made an about turn and expressed some doubts on the authenticity of the same said letter which he had earlier confirmed.

[18] Given this state of affairs, I agree with the contention of learned counsel for the plaintiff that the defendants are now estopped from changing their position in a way that is inconsistent with what had been agreed in relation to the said letter. In relation to the law on estoppel, s 115 of the Evidence Act 1950 ('EA') provides:

When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[19] In the instant case, the plaintiff is relying specifically on estoppel by convention. In *The August Leonhardt* [1985] 2 Lloyd's Rep 28, Kerr LJ stated:

We deal first with estoppel by convention. A convention statement of this principle is to be found in the following passage in Spencer Bower and Turner on *Estoppel by Representation*, (3rd Ed) at p 157 which was cited with approval by Eveleigh and Brandon LJ (as they then were) in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 Lloyd's Rep 27; [1982] QB 84 at pp 126 and 130 as follows:

This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed by the convention of the parties as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given statement of facts is to be accepted between them as true, then as regards that transaction, each will be estopped against the other from questioning the truth of the statement of facts so assumed (as applied in *Wardley Ltd v Bestland Development Pte Ltd (in liquidation) & Anor and other appeals* [1992] 2 SLR 961).

[20] I cannot help making the observation that if indeed the first defendant is saying that there could be another letter or corrected letter surely he will be able to produce it or at the very least, he would have asked for it to be produced. He cannot now try to sidestep the said letter of 1 February 1997 merely on a simple unsubstantiated assertion that it may not be the letter that he had acknowledged. I can only think that he is doing so as an afterthought.

A [21] On the issue of the non-production of the original, in view of my earlier
observation on the said letter, I am convinced that the original must have been
kept by the first defendant and the duplicate returned to PW1. That would be
the logical thing to do as after having acknowledged receipt of it, the
B defendants would certainly want to keep it. If that was not the case, as the first
defendant is now appearing to allege, I am unable to see how the defendants
were able to write the letters dated 1 February 1997 and 4 February 1997
alluding to the contents of the impugned letter. Additionally, I cannot imagine
any firm of solicitors not keeping a copy of the letter in which they are
C acknowledging receipt of a cheque especially one for a substantial amount of
money. Solicitors are by and large meticulous record keepers.

[22] The plaintiff was also unable to produce their own copy of the said
letter. However, there was evidence from PW2, the chairman and managing
D director of the plaintiff, that their copy was given to their previous solicitors
Messrs Raja Eleena Siew Ang & Associates. The plaintiff had written to the said
solicitors for the files in a letter dated 27 February 2007 (exh P4). The said
solicitors replied that they did not have the files with them. This was not
E seriously challenged by the defendants.

[23] On the question of admissibility of secondary evidence, s 65(1)(a) of the
EA provides that secondary evidence may be given of the existence, condition
or contents of a document admissible in evidence where the original is shown
F or appears to be in the possession or power of the person against whom the
document is sought to be proved. A notice to produce as provided in s 66 of the
EA must first be issued. In the instant case, although notice was issued late
because of the defendants sudden change of position, I considered that no such
notice was necessary as from the nature of the case, the defendants must know
G that they will be required to produce it (see s 66 proviso (b) of the EA). In any
event under this provision, 'the court has absolute power, when it thinks fit, to
dispense with the notice' (per Sir George Rankin in *Surendra Krishna Roy v
Mahammad Syed Ali* (1936) 160 PC 28 at p 32).

H [24] Recourse can also be had to s 65(1)(c) of the EA which provides for the
admissibility of secondary evidence when the original has been destroyed or
lost, or when the party offering evidence of its contents cannot for any reason
not arising from his own default or neglect produce it in reasonable time (see
I *Tan Sri Tan Hian Tsin v Public Prosecutor* [1979] 1 MLJ 73).

[25] For all the reasons aforesaid, I am more than satisfied that the said letter
of 1 February 1997 marked as ID1 can be admitted as secondary evidence
under s 65 of the EA.

Do the terms of the said letter reflect a stakeholding agreement?

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[26] The question that follows is whether the terms in the said letter of 1 February 1997 reflect a stakeholding agreement? The law on stakeholding is fairly settled. In *Maloney v Hardy* (1970) 216 EG 1582, it was held:

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A stakeholder properly so called holds money in medio to abide an event; he holds for both parties and not for either alone pending the event. But when there is no contract for sale in existence the purchaser's deposit is in no way bound; he may at any moment demand his own money back from the agent, saying that he no longer wishes to negotiate, and the agent must repay him.

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[27] In *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] CLJ (Rep) 400, Hashim Yeop Sani SCJ appraised the law relating to stakeholding as follows at p 118 (MLJ) and p 402 (CLJ):

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What is in essence stakeholding? The word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

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In sale and purchase agreement cases, the position is put clearly by Lord Edmund-Davies in *Sorrell and another v Finch* [1977] AC 728 who repeated what was said in *Maloney v Hardy* (1970) 216 EG 1582:

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The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

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In other particular case of sale and purchase whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.

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In *Burt v Claude Cousins & Co Ltd and another* [1971] 2 QB 426 Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell and another v Finch*. He said:

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If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the

- A purchaser. He holds it as trustee for both to await the event: see *Skinner v The Trustee of the Property of Reed and others* [1967] 2 All ER 1286 at p 1289, per Cross J. Until the event is known, it is duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v Hoggart* (1830) 1 B & Ad 577. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent for solicitor for it: *Eltham v Kingsman* (1818) 1 B & Ad 683 and *Hampden v Walsh* (1876) 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.
- C Pennycuik V-C in *Potters (a firm) v Loppert* [1973] 1 All ER 658 at p 661 considered the law in relation to contract deposits. Where money is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.
- E [28] It seems to me therefore that a stakeholding duty arises where money is paid to a solicitor pending the outcome of a future event and he holds such money as trustee until the event is known. What he has to do then will depend on the agreement of the parties. I think this was precisely the sort of arrangement that existed in the instant case.
- F [29] In the instant case, the terms of the arrangement were explicit. To recap, the relevant terms in the letter of 1 February 1997 were:
- G (a) that upon receipt of the stakeholding sum, the first defendant was to extend details and information regarding the project; and
- H (b) once the plaintiff was satisfied with the feasibility and viability of the project and upon receipt of the letter of award the plaintiff would officially inform the defendants to authorise the release of the stakeholder sum.
- I [30] The defendants, however, argued that the instant case was not one of a stakeholding because there was no pending outcome of a future event. They sought to rely on an earlier letter dated 24 January 1997 from Uniquet to the defendants to set out their duty to release the said sum of RM470,000 even before the commencement of negotiations. This arrangement was rather unusual in itself. The last paragraph of the said letter bears this out:

We hope the above is clear and upon receipt of the first 1% to be deposited to your legal firm as stakeholders by Dolomite Industries Co Sdn Bhd must be released to us within 14 days of this letter for us to commence our negotiation. Failing which the project shall not be made available to Dolomite Industries Co Sdn Bhd and we are free to negotiate the same project to any other interested party and your client shall have no further claim against us. Please be informed that all payments made is not refundable.

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[31] The plaintiff says this letter was contrived but it was confirmed to be authentic by DW2 who wrote it. What this means is that there appeared to be a conflict between the parties as to the event that would trigger the release of the sum of RM470,000 deposited with the defendants. Even so, the question is — can the defendants then choose to pay Uniquet and ignore the explicit terms of the letter of 1 February 1997 as to when payment can be effected?

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[32] In this regard, the first defendant has taken pains to point out that his legal firm may face a lawsuit for jeopardising a RM400m plus project if it fails to effect payment of the stakeholder sum. He claims that it was safer for him to effect payment and he will then get the plaintiff to amend their letter of 1 February 1997.

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[33] Even adopting the most charitable view of the position that the defendants were taking, what stands out however is how any solicitor can think that he could ignore the explicit terms of a payment arrangement in the hope that he could persuade the parties to somehow change those terms. The logical thing to do, if the defendants were uncomfortable or unhappy with such terms, would be to return the cheque and the letter with the response that we are unable to help you.

F

[34] As it turned out, there was no such amendment to the terms except for some letters by the defendants which the plaintiff says were all contrived. Contrived or not, what is significant is that there was no response at all by the plaintiff to the defendants' letters thus fueling suspicion that the defendants' letters were manufactured. The net result is that the terms of the letter of 1 February 1997 are effective and cannot be willy nilly disregarded by the defendants.

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[35] The terms of the said letter clearly reflected a stakeholding arrangement as the release or payment awaited the occurrence of a future event. That future event was information leading to the satisfaction of the plaintiff of the feasibility and viability of the project and authority to release the stakeholder sum. In any event, whatever label you may put on the arrangement, the crux is that the defendants were bound by the terms of the arrangement which they had accepted.

I

A *Was there a breach of the stakeholding agreement?*

B [36] It was not disputed that no details and information regarding the project were provided and importantly, the plaintiff never authorised the defendants to release the sum of RM470,000. As a result, there was a breach by the defendants of the terms of the stakeholding arrangement. It must therefore follow that the plaintiff is entitled to recover the stakeholder sum.

C [37] In coming to this view, I had not overlooked the contention of the defendants that they were not acting for the plaintiff and that therefore there was no privity of contract. If that was indeed the case, it was open to the defendants to decline acceptance of the cheque when it was first delivered. However, once they had accepted the cheque, they became bound to the terms under which the cheque was given. I fail to see how there was no privity when the letter of 1 February was addressed to the defendants by the plaintiff. For these reasons, the contention of no privity of contract does not bite.

COUNTERCLAIM

E [38] The defendants have a counterclaim for RM200m against the plaintiff for loss of reputation by reason of this suit. No evidence was however led to support this claim apart from the oral testimony of the first defendant that the defendants suffered from a lot of embarrassment from reports in the media as well as from investigations by the authorities. The plaintiff, however, says that this counterclaim was meant for no other purpose than to intimidate them. They rely on absolute privilege.

G [39] Absolute privilege provides complete immunity from liability for a person's statements. The accuracy of such statements as well as the motives of the person making the statements is irrelevant. This defence is generally available only for Parliaments and the courts. The rationale for providing this immunity is that free communication is so vital for the proper functioning of the institutions of Parliament and the courts that it must override any individual's interest in protecting his or her reputation.

H [40] According to *Gatley on Libel and Slander*, (10th Ed), para 13.6, absolute privilege in a court of justice can be divided into three categories. In this regard, reference was made to the statement by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237 at p 257:

I The first category covers all matters which are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and

extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Sir Patrick H Watson v Mrs JP Jones or M'Ewan* [1905] AC 480 in which the House of Lords held that the privilege attaching to evidence which a witness gave *coram judice* attached to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings.

[41] As far as the instant case is concerned, what is relevant is that absolute privilege will attach to all matters beginning with the institution of the suit together with the statements made in the pleadings and other documents in the course of proceedings. For this reason, the defendants' counterclaim cannot succeed.

RESULT

[42] In the premises, the plaintiff is entitled to judgment for the sum of RM470,000 against the defendants. The plaintiff is also entitled to interest on the said sum at the rate of 8%pa from the date of the writ of summons until realisation. The counterclaim of the defendants is dismissed. The plaintiff is also entitled to one set of costs which, after hearing the parties, I assess at RM35,000.

Plaintiff's claim allowed with costs and defendants' counterclaim dismissed.

Reported by Mashrifah Ravendran

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